Malayan Association of Private Colleges and Universities & Ors v Registrar General of Private Education Institutions & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–94–04 OF 2013
ASMABI MOHAMAD J
26 JANUARY 2016

Civil Procedure — Summary application — Rules of Court 2012, O 14A — Applicants applied for judicial review against respondents — Respondents filed application pursuant to O 14A of the Rules of Court 2012 pending hearing of judicial review application — Whether court had jurisdiction to summarily determine judicial review application by way of O 14A — Whether applicants accorded with threshold locus standi — Whether application under O 14A abuse of court's process — Rules of Court 2012 O 14A & O 53

The applicants had filed a judicial review application ('the JR application') against the Registrar General of Private Education Institution ('the first respondent') for declarations that a circular dated 23 January 2013 issued by the first respondent ultra vires ss 29, 30 and 33 of the Private Higher Education Institutions Act 1996, art 96 of the Federal Constitution as well as the Competition Act 2010. In short, the applicants had challenged the decision of the first respondent on the grounds of illegality, procedural impropriety and unreasonableness. Pending the hearing of the JR application, the respondents had filed encl 32 pursuant to O 14A of the Rules of Court 2012 ('the ROC'), amongst others, seeking for the order from the court to determine the issue of whether the applicants had the legal standing to take out the JR application. In response, the applicants urged the court to dismiss encl 32 in limine on the grounds that the specific framework prescribed under O 53 of the ROC did not confer the court with the jurisdiction to summarily determine the JR application by way of O 14A application.

Held, dismissing encl 32 with costs:

(1) O 14A of the ROC is not incorporated in O 53 of the ROC and/or reference is made either in O 53 or O 14A for the applicability of O 14A procedure. Therefore, it is clear that the intention of Rules Committee is not to allow any other applications apart from those specifically provided in O 53, to be used. Further it is a settled principle that an application for

judicial review is required to be filed in strict compliance with the provision of O 53 (see paras 22–23).

(2) The applicants in the instant case had been accorded with the requisite threshold locus standi when they were granted leave to commence the JR application on 22 May 2013. Therefore, it was obvious that the third respondent's attempt to move the court by way of encl 32 was in effect an attempt to challenge the order granting leave for the applicants to proceed with the substantive motion given on 22 May 2013, which was not permitted within the framework of O 53 of the ROC (see paras 26–27).

(3) The attempt of the third respondent by way of O 14A of the ROC was clearly an abuse of the process of court to avoid the rather speedy hearing of the substantive motion provided by O 53 of the ROC. The issues of law which the third respondent proposed to pose for the court's determination could be dealt with in the substantive JR application. This would allow the court to dispose of the JR application speedily (see para 32).

(4) It would not be right for the court to deny the applicants the right to be heard in a judicial review proceeding by disposing their application by summary application where the applicants had fulfilled the requisite threshold requirement for leave. By surpassing the threshold for leave application, the applicant would have legitimate expectation that it would be provided proper hearing in the substantive stage. Therefore, it would be proper that all the issues raised by third respondent to be taken in the substantive stage for determination by the court (see para 33).

[Bahasa Malaysia summary

Pemohon-pemohon telah memfailkan permohonan semakan kehakiman ('permohonan SK') terhadap Pendaftar Institusi Pendidikan Swasta ('responden pertama') bagi perisytiharan bahawa pekeliling bertarikh 23 Januari 2013 dikeluarkan oleh responden pertama ultra vires ss 29, 30 dan 33 Akta Institusi Pendidikan Tinggi Swasta 1996, perkara 96 Perlembagaan Persekutuan dan juga Akta Persaingan 2010. Secara ringkas, pemohon-pemohon telah mencabar keputusan responden pertama atas alasan ketaksahan, prosedur tidak betul dan tidak munasabah. Sementara menunggu permohonan SK, responden-responden telah memfailkan lampiran 32 berikutan A 14A Kaedah-Kaedah Mahkamah 2012 ('KKM'), antara lain, memohon untuk perintah daripada mahkamah untuk menentukan isu sama ada pemohon-pemohon mempunyai kedudukan undang-undang untuk memohon permohonan SK tersebut. Dalam menjawab, pemohon-pemohon

mendesak mahkamah untuk menolak lampiran 32 *in limine* atas alasan bahawa rangka kerja spesifik yang ditetapkan di bawah A 53 KKM tidak memberikan mahkamah bidang kuasa untuk secara ringkas menentukan permohonan SK melalui permohonan A 14A.

Diputuskan, menolak lampiran 32 dengan kos:

(1) A 14A KKM tidak digabungkan dalam A53 KKM dan/atau rujukan dibuat sama ada dalam A 53 atau A 14A bagi kebolehgunaan prosedur A 14A. Oleh itu adalah jelas bahawa niat Jawatankuasa Peraturan untuk tidak membenarkan apa-apa permohonan lain selain daripadaa yang diperuntukkan secara spesifik di dalam A53, digunakan. Selanjutnya ia adalah prinsip ditetapkan bahawa permohonan untuk semakan kehakiman diperlukan untuk difailkan dengan mematuhi peruntukan A 53 (lihat perenggan 22–23).

(2) Pemohon-pemohon di dalam kes ini telah diberikan dengan ambang locus standi yang diperlukan apabila mereka diberikan izin untuk memulakan permohonan SK pada 22 Mei 2013. Oleh itu, adalah jelas bahawa percubaan responden ketiga untuk memohon kepada mahkamah melalui lampiran 32 adalah sebenarnya percubaan untuk mencabar perintah yang memberikan izin bagi pemohon-pemohon untuk meneruskan dengan usul substantif yang diberikan pada 22 Mei 2013, yang mana tidak dibenarkan dalam rangka kerja A 53 KKM (lihat perenggan 26–27).

(3) Percubaan responden ketiga melalui A 14A KKM jelas penyalahgunaan proses mahkamah untuk mengelak pendengaran cepat usul substantif yang diperuntukkan oleh A 53 KKM. Isu undang-undang yang mana responden ketiga mencadangkan untuk dikemukakan bagi penentuan mahkamah boleh diuruskan dengaan permohonan SK substantif tersebut. Ini akan membenarkan mahkamah untuk mendengar permohonan SK dengan segera (lihat perenggan 32).

(4) Adalah tidak betul bagi mahkamah untuk menafikan pemohon-pemohon hak untuk didengar dalam prosiding semakan kehakiman dengan melepaskan permohonan mereka melalui permohonan ringkas di mana pemohon-pemohon telah memenuhi keperluan minimum yang diperlukan bagi izin. Dengan melepasi ambang untuk permohonan izin, pemohon mempunyai harapan yang sah bahawa ia akan diperuntukkan dengan pendengaran yang betul di peringkat substantif. Oleh itu, ia akan menjadi betul jika kesemua isu yang dibangkitkan oleh responden ketiga didengar di peringkat substantif untuk penentuan oleh mahkamah (lihat perenggan 33).]

Notes

For cases on summary application in general, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9084–9087.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)
Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor [2016] 1 MLJ 544; [2015] 2 AMR 89, FC (refd)
Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307; [2009] 6 CLJ 405, FC (refd)
O'Reilly v Mackman and others and other cases [1982] 3 All ER 1124, FC (refd)
Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8, CA (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164, CA (folld)

Legislation referred to

Competition Act 2010
Federal Constitution art 96
Private Higher Education Institutions Act 1996 ss 29, 30, 33
Rules of Court 2012 O 14A, O 24, O 26, O 38, O 53, O 53 rr 6, 7, 8, 9

Steven Thiru (Gregory Dass with him) (Shook Lin & Bok) for the first to 55th applicants.
Natrah bt Idris (Senior Federal Counsel, Attorney General's Chambers) for the first and second respondents.
Gopal Sreneevasan (S Ravindran and Michelle Ng with him) (Sreenevasan Young) for the third respondent.

Asmabi Mohamad J:

INTRODUCTION

[1] This is a judicial review application ('JR application') filed by 55 private institutions, ('the applicants') against the Registrar General of Private Education Institution ('the first respondent') and two others, for the relief in the form of declarations that:

(a) the circular dated 23 January 2013 issued by the registrar under reference TPT(BPPA)1000/05/08 *Jld* 2 (1) ('the circular') to all private institutions in Malaysia is ultra vires ss 29, 30, and 33 of the Private Higher Education Institutions Act 1996 ('Act 555');

(b) the circular is ultra vires art 96 of the Federal Constitution as an unauthorised levy under Federal laws;

(c) the circular is ultra vires the Competition Act 2010 as providing a monopoly or dominant position for the third respondent; and

(d) the exercise of the powers under s 29 of the Act is tainted with unreasonableness and procedural impropriety; and illegality.

[2] Besides the above stated prayers, the applicant had also sought for a certiorari to quash the first respondent's decision to issue the said circular.

[3] Vide the said circular first respondent purported to introduce additional conditions relating to the registrations for private institutions pursuant to s 29 of Act 555.

[4] Under the said circular, all private institutions were required to utilise the Student Applications and Registrations System ('the STARS system') purportedly owned and operated by Education Malaysia Global Services, ('the third respondent') for the purpose of submitting application for an international student pass to study in Malaysia on behalf of its students.

[5] Under the said circular, the private institutions were required to pay RM1,000 directly to the third respondent upon submission of the application for the international student pass.

[6] In a nutshell, the applicants had challenged the decision of the first respondent on the grounds of illegality, procedural impropriety and unreasonableness.

[7] As at 13 November 2014 the instant JR application was already ready for hearing and all parties to the action had filed the necessary affidavits.

[8] However, there is still pending an application filed by the applicant for interrogatories under O 53 r 6 of the Rules of Court 2012 (encl 17).

THE ORDER 14A APPLICATION

[9] On 13 November 2014, the third respondent has filed encl 32 pursuant to O 14A of the Rules of Court 2012 ('the ROC'), amongst others, seeking for the order from this court to determine the following questions:

(a) whether the first and second applicants have the legal standing to take out the judicial review application dated 30 April 2013 ('the JR application'); and

(b) whether the third to the 55th applicants have the legal standing to take out the JR application.

[10] In the event the first and second questions stated above were answered in the negative, the third respondent prayed for the costs of the JR application as well as the costs for encl 32 to be borne by the applicants.

[11] For the purpose of encl 32, the following documents had been filed and referred to by the court:

(a) the notice of application filed by the third respondent dated 13 November 2014 ('encl 32');

(b) the third respondent's affidavit affirmed on 12 November 2014 ('encl 33');

(c) the applicants' affidavit in reply affirmed on 27 November 2014 ('encl 34');

(d) the applicants' further affidavit in reply affirmed on 15 January November 2015 ('encl 36'); and

(e) reference was also made to all the relevant documents for the purpose of the JR application. These documents were listed in Tab 'A' to the applicants' written submission.

THE LAW

[12] The third respondent sought to move this court by way of O 14A of the Rules of Court 2012 which provides as follows:

> (1) The Court may upon the application of a party or on its own motion, determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that —
>
> (a) Such question is suitable for determination without the full trial of the action; and
>
> (b) Such determination will finally determine the entire cause or matter or any claim or issue therein.

[13] The principles governing O 14A of the ROC had been well illustrated in the case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 where the Court of Appeal held that O 14A of the ROC allows the court to determine any question of law or construction of document if it appears to

A the court that such question is suitable for determination without going through the process of a full trial and such determination will ultimately determine the entire cause or matter or any claim or issue.

B **[14]** According to the third respondent the question of law which the third respondent sought this court to determine was premised on its objection to the JR application as pleaded in para 5 of the third respondent's affidavit No 3 as follows:

> 5. I refer to paragraphs 40 to 42 of the Affidavit. I am advised by my solicitors and
C believe that:
>
> 5.1 It is not clear who the 1st and 2nd Applicants represent in these proceedings;
>
> 5.2 The 1st and 2nd Applicants have not shown how they are adversely affected by the decisions they seek to impugn in these proceedings;
>
D 5.3 The 1st and 2nd Applicants have not commenced these proceedings in the name of their registered public officers (if any); and
>
> 5.4 The 3rd to 55th Applicants do not possess legal personality and accordingly *locus standi* to make this application.

E WHETHER O 14A CAN BE RESORTED TO IN A JR APPLICATION

[15] At the outset I have asked both learned counsels for the third respondent and the applicants to submit on whether the third respondent can
F resort to an O 14A application for the purpose of determining the issues in the JR application which had passed the test of the low threshold when leave was granted to the applicants for the substantive motion to be heard on merits.

[16] Learned counsel for the third respondent had submitted that as the
G issues raised in the affidavit of the third respondent involved only issues of law, it would be more expedient for this court to resolve these issues by way of an O 14A application rather than going through the whole process of hearing the JR application on its merits. Learned counsel contended that upon the determination of the issues of law framed in encl 32, the court would be in a
H position to finally determine the entire cause or matter and resolve this instant JR application once and for all.

[17] It was also the contention of the third respondent that it could not move the court sooner by way of O 14A application as the third respondent was not
I a party at the time the leave application for judicial review was filed on 30 April 2013 and when leave was granted on 22 May 2013. It was only when leave was obtained on 29 August 2013 that the third respondents were allowed to intervene and be made a respondent in the JR application. In view of the aforesaid the third respondent argued that it could not be said to have

circumvented the provision of O 53 of the ROC. Hence encl 32 would be the only recourse opened to the third respondent to raise these issues of law.

[18] Learned counsel for the applicants on the other hand had urged this court to dismiss encl 32 in limine on the grounds that the specific framework prescribed under O 53 of the ROC does not confer this court with the jurisdiction to summarily determine the JR application by way of an O 14A application.

[19] It is a well-entrenched principle that O 53 of the ROC had laid down a specific framework for purposes of all judicial review applications. There is already a set of well laid procedural rules to be complied with when moving the court by way of judicial review applications. This principle had been reiterated in the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307; [2009] 6 CLJ 405 where the Federal Court held as follows:

> *[16] Based on the above well laid-out provisions in the RHC it is evident that the Rules Committee had intended to establish a specific framework for the determination of applications for judicial review.* In my view O 53 of the RHC was specifically drafted for judicial review. It has been revised over time, the last amendment to O 53 of the RHC having taken place in the year 2000 by which it was substantially revised and amended vide PU(A) 342/2000. It is my judgment that O 53 r 8(1) of the RHC specifically caters to persons claiming an interest in the proceedings and who wish to be heard in opposition. This is discernable from the language of the rule in particular the phrase '… appears to the judge to be the proper person …'. *As a specific rule was put up in place for judicial review proceedings, the more general basis for intervention under O 15 r 6 (2) cannot be invoked. The maxim 'generalia specialibus non derogant' would apply.* The decision of the majority of the Court of Appeal in the present case that the appellant's application must be brought under O 53 r 8(1) of the RHC in my view was therefore correct. Question 1 is therefore answered in the negative. (Emphasis added.)

[20] This principle had been reinforced by the same court vide the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 where the Federal Court held as follows:

> *However, O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court.* (Emphasis added.)

[21] Taking the que from the above quoted authorities the maxim *generalia specialibus non derogant* applies to preclude any and all possibility for a judicial review application to be conducted in accordance with a set of procedural rules

that are distinct from O 53. Therefore, the law is quite settled that all judicial review actions must be commenced and dealt with in accordance with the specific procedural rules stipulated in the said O 53.

[22] This can be further illustrated by examining the provisions of O 53 itself. For instance, O 53 r 6 specifically refers to O 24 for discovery and inspection of documents, O 26 for interrogatories, O 38 for cross-examination of the deponent of any affidavit, O 53 r 7 allows for amendment to the statement or further affidavit to be used and O 53 r 8 allows any desirable party to file application to intervene in the judicial review proceedings. These provisions were specifically provided within the framework of O 53 despite similar provision having been provided elsewhere in the ROC. In the case of O 14A, the same was not incorporated in O 53 and/or reference is made either in O 53 or O 14A for the applicability of O 14A procedure. Therefore, it is clear that the intention of Rules Committee is not to allow any other applications apart from those specifically provided in O 53, to be used.

[23] Further it is a settled principle that an application for judicial review is required to be filed in strict compliance with the provision of O 53. This principle was again discussed in *Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor* [2016] 1 MLJ 544; [2015] 2 AMR 89 where the court had restated the law that all applicants who are seeking relief by way of judicial review must observe the explicit procedure set out under O 53. Failing which such applications will not be entertained by the court. The same message was conveyed in *Ahmad Jefri Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor.*

[24] Any attempt to invoke other provisions of the law tantamount to adding words into O 53 which is not envisaged by the Rules Committee. More so in this case the judicial review application had met with the low threshold and leave had been granted to the applicants to proceed for the JR Application on merits.

[25] It is settled that an applicant in a judicial review application is clothed with the threshold locus standi once leave had been granted by the court to commence the judicial review proceedings. This principle had been reflected in the case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 where the Court of Appeal held as follows:

> Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep out litigants who had no legitimate grievance against administrative arm of the State. The object was to protect them from crossing the threshold of the courts for justice. *The requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi'. It is quite*

different from the doctrine of 'substantive locus standi' which falls to be determined by court at the very end of the case when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour (see Tan Sri Haji Othman Saat v Mohamad bin Ismail [1982] 2 MLJ 177). (Emphasis added.)

[26] Guided by the above authority it would appear that the applicants in the instant case had been accorded with the requisite threshold locus standi when they were granted leave to commence the JR application on 22 May 2013.

[27] Therefore, it is obvious that the third respondent's attempt to move the court by way of encl 32 is in effect an attempt to challenge the order granting leave for the applicants to proceed with the substantive motion given on 22 May 2013, which is not permitted within the framework of O 53 of the ROC. Allowing the third respondent to do so would tantamount to going against provision of O 53 r 9 which states that 'an application to set aside any order made by the Judge shall not be entertained, but the aggrieved party may appeal to the Court of Appeal'.

[28] I am of the view, because of the peculiar nature of the proceeding before the court which requires the judicial review application to be disposed of expeditiously as the process involve decision of one arm of the administration, parties must only resort to the specific framework provided by the law. This is also in line with the intent and purport of O 53 so that decisions are made fast to allow the arm of the administration to move on with their daily public functions entrusted by the law.

[29] In *Ahmad Jefri Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor* the Federal Court had stated that the stringent conditions imposed by O 53 is aimed to reduce delay in resolving judicial review applications in the interest of good administration. The Federal Court had quoted the judgment of Lord Diplock in *O'Reilly v Mackman and others and other cases* [1982] 3 All ER 1124 at p 1133 with approval as follows:

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making process for any longer period than is absolutely necessary in fairness to the person affected by the decision.

[30] I fail to understand the reason for learned counsel for the third respondent to move the court by way of encl 32 when the issues which learned counsel posed for the court's determination could very well be ventilated during the hearing of the JR application. This is in fact an attempt by the third

respondent to defeat the leave which was granted to the applicants on 22 May 2013.

[31] On this note, I wish to quote some excerpts from the judgment of His Lordship Tun Zaki bin Tun Azmi CJ ('as His Lordship then was') from the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* as follows:

> [4] Now, the court is blamed for the delay. The public gets frustrated. In my opinion, the Court could perhaps have gone ahead and made a decision on the application for administrative review. *The question of whether the appellant should be made a party can be decided and appealed together if necessary.* These delays have caused unnecessary anguish over the people for whom the appellant is supposed to be acting for. (Emphasis added.)
>
> [5] Courts should be more diligent in dealing with such cases. Parties expect speedy disposal of reviews. That is why applications for review of administrative decisions are provided by way of certiorari or mandamus instead of by way of writ. The law provides for a simple way of disposing these cases. Instead of a speedy disposal of a review application, this case has taken as long as it would in a hearing of a writ ...

[32] The attempt of the third respondent by way of O 14A is clearly an abuse of the process of court to avoid the rather speedy hearing of the substantive motion provided by O 53 of the ROC. As mentioned in the above quoted case the issues of law which the third respondent proposed to pose for the court's determination could be dealt with in the substantive JR application. This would allow the court to dispose of the JR application speedily.

[33] It would not be right for this court to deny the applicants the right to be heard in a judicial review proceeding by disposing their application by summary application, as had been applied by third respondent in this case, where the applicants, who want to enforce their constitutional rights, in the first place have fulfilled the requisite threshold requirement for leave. By surpassing the threshold for leave application, the applicant would have legitimate expectation that it will be provided proper hearing in the substantive stage. Therefore, it would be proper that all the issues raised by third respondent to be taken in the substantive stage for determination by this court.

CONCLUSION

[34] Based on the aforesaid it is my humble view that it is not the intention of the Rules Committee to allow the applicants in the judicial review applications to move the court by way of O 14A in judicial review proceedings. If that was the intention of the Rules Committee the same would have been incorporated into the scheme of O 53 of the ROC. For the above stated reasons, encl 32 is therefore dismissed with costs in the cause and date to be set for the hearing of the JR application.

Enclosure 32 dismissed with costs.

Reported by Dzulqarnain Ab Fatar